Filed 12/9/15 P. v. Cooley CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA BRYAN COOLEY, Defendant and Appellant.	A142099 (Humboldt County Super. Ct. No. CV080941)

Appellant Joshua Bryan Cooley was committed to an indefinite term at a state hospital after having been found a sexually violent predator (SVP) under the Sexually Violent Predators Act (SVPA). (Welf. & Inst. Code,[1] § 6600 et seq.) In 2013, he petitioned for conditional release pursuant to section 6608, subdivision (a), and his petition was denied. He contends that the trial court failed to follow the required procedures and that on the merits, it should have granted his petition. We shall remand the matter with directions for the trial court to consider Cooley's petition in accordance with the procedures specified in section 6608.

[1] All statutory references are to the Welfare and Institutions Code.

I. BACKGROUND

Cooley is confined at Coalinga State Hospital (Coalinga) after being found an SVP. He appealed the finding that he was an SVP, and in 2011, we rejected almost all of his challenges.[2] (*People v. Cooley* (Sept. 30, 2011, A128278) [nonpub. opn.] (*Cooley I*).)

A. Annual Report

Jay Malhotra, Ph.D., carried out an annual evaluation of Cooley in February 2013.[3] He concluded that Cooley was diagnosed with "Paraphilia, Not Otherwise Specified (NOS), Alcohol Abuse, and Borderline Intellectual Functioning," and opined that he currently met the definition of an SVP in that he had one or more victims of a sexual crime and had a diagnosed mental disorder that made him a danger to the health and safety of others in that he was likely to engage in sexually violent criminal behavior.[4] Cooley had not completed the sexual offense treatment program (SOTP) at the hospital and had not had sufficient treatment for his diagnosed mental condition and other risk factors. Dr. Malhotra concluded that Cooley's best interest and the protection of the community could not be assured in a less restrictive setting, and neither conditional nor unconditional release would be appropriate.

The report summarized Cooley's criminal history. In 2001, he was charged with sexual battery and criminal threats. In 2002, at age 21, he kidnapped and raped a 12-

[2] The sole exception was his challenge on grounds of equal protection, an issue that was the subject of pending litigation at the time in another case. (*People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*).) Pursuant to the high court's direction, we directed the trial court to suspend further proceedings pending finality of the proceedings in *McKee*. In June 2013, after the *McKee* proceedings were final (see *People v. McKee* (2012) 207 Cal.App.4th 1325), the suspension in this case was lifted and the trial court affirmed the commitment.

[3] Cooley did not allow Dr. Malhotra to interview him.

[4] The diagnosis of paraphilia appears to have been made after Cooley was found to be an SVP: In *Cooley I*, one of the issues we faced was whether Cooley was appropriately found to be an SVP in the *absence* of a diagnosis of some sort of paraphilia.

year-old girl. He was sentenced to four years, eight months in prison.[5] In 2007, at age 27, he provided alcohol to two 12-year-old girls and brought them to his home, where he "ma[de] out" with a 17-year-old female. Because this was a parole violation, he was returned to custody for 12 months.

Cooley had an IQ in the "borderline" range; his memory skills were less than would be expected based on his IQ, probably as a result of a head injury he sustained as a teenager. Cooley had admitted to having problems with impulse control and said he often became angry and wanted to strike out at people. He had a pattern of alcohol abuse.

Dr. Malhotra had reviewed Cooley's recent hospital records and noted that he appeared to have had a difficult time adjusting to hospitalization. He was irritable and negative toward staff, and was often uncooperative, defiant, and impulsive. However, there were no indications of bizarre behavior, disorganized thinking, hallucinations, paranoia, or suicidal ideation. He had not been prescribed psychotropic medication. Staff at the hospital reported that Cooley's behavior had recently improved. Cooley had consistently refused to participate in the SOTP.

Dr. Malhotra opined that Cooley's "Axis I" diagnoses were "Paraphilia, Not Otherwise Specified (NOS), Sex with Non-Consenting Persons," "Dementia Disorder, due to General Medical Condition (Head Injury), With Behavior Disturbance," and "Alcohol Abuse." His "Axis II" diagnoses were antisocial personality disorder and borderline intellectual functioning. He concluded Cooley's pattern of offenses "indicate[d] sexual preoccupation of a coercive nature and an apparent disturbance of his volitional control over such behaviors (twice violating his parole stemming from prior sex crimes . . .). His preference for victims who are minors appears related to opportunity rather than a specific pedophilic attraction." He also noted that Cooley had had "recurrent alcohol related legal problems."

[5] According to our opinion in *Cooley I*, Cooley pled guilty to battery in connection with the 2001 incident, and he was convicted of committing a lewd or lascivious act on a child under the age of 14 and sexual battery as a result of the 2002 incident.

Cooley had received a score of nine on an actuarial measure of relative risk of sex offense recidivism, the STATIC-99R, which placed him the high risk category for reoffending, or in the top percentile. He had a number of risk factors for reoffense, including his lack of concern for others, lack of sexual self-regulation, impulsivity, poor problem-solving skills, poor cooperation with community supervision, and diagnosed personality disorder. In addition, he did not participate in the inpatient SOTP and had not prepared a plan for such treatment in the community. Thus, he had not shown "treatability and progress in the [inpatient] treatment program." Dr. Malhotra opined: "It is unreasonable, therefore, to expect that upon release, he would seek out and enroll in a community based treatment program. As of now, it appears that Mr. Cooley cannot be effectively and safely treated in the community."

B. Cooley's Motion and Dr. Abrams's Testimony

In November 2013, Cooley moved for conditional release. (§ 6608, subd. (a).) The trial court granted Cooley's application for appointment of a medical expert, Dr. Alan A. Abrams.

Dr. Abrams testified at the hearing on the motion, which took place on May 21, 2014. Dr. Abrams testified that he was both a psychiatrist and an attorney, that he was a professor of clinical psychiatry at the University of California San Diego, and that he also taught forensic psychology and maintained a private practice. He had been the chief psychiatrist at the California Medical Facility in Vacaville, which had shared the facility with the Department of State Hospitals, and he had interacted with the state hospital on a daily basis.

Dr. Abrams first evaluated Cooley in 2009, before his initial commitment, and he had most recently seen him a week before the hearing on the petition for conditional release. He had reviewed as many of Cooley's medical records as were made available to him, and had also reviewed reports prepared by other psychiatrists before Cooley's previous hearing, in 2009 and 2010.

Under the current version of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), Dr. Abrams diagnosed Cooley with alcohol use disorder, intellectual

disability, and personality disorder due to a brain injury. He explained that before the age of 14, Cooley was mildly mentally retarded. When Cooley was 14, he swung over a canyon, lost his grip, and fell on his head. He was in a coma for some time and suffered brain swelling and damage to his frontal lobes.

Dr. Abrams opined that defendant did not suffer from paraphilia, which he explained meant "a deviant, which means non-consenting, sexual activity with abnormal targets or with abnormal behavior which is intense and persisting in the person's life." He explained that state evaluators had a history of using the diagnosis of "paraphilia NOS" to describe "any criminal sexual offending as the result of a mental disorder." However, he continued, the committee that prepared the DSM-5 had "reviewed that topic in detail and very strongly rejected that use of paraphilia NOS to mean any criminal sexual offending." He described "paraphilia NOS nonconsenting" as a "made-up diagnosis" used by state evaluators.

Nothing in the records Dr. Abrams had reviewed indicated that Cooley had a history of deviant sexual behavior. He had not possessed pornography at Coalinga, he had not shown any sexual interest in children, and there was no indication he watched shows that depicted violence toward women. Nothing in his Coalinga records revealed any ongoing deviant sexual activity. Cooley had refused to accept treatment for paraphilia because he did not believe he was a sexual deviant.

Dr. Abrams did not believe Cooley met the criteria for antisocial personality disorder because he did not show a repetitive and persistent pattern of violating other people's rights while not intoxicated.

Dr. Abrams believed that Cooley's alcoholism had been a major factor in his previous offenses, and that alcohol was a "necessary pre-condition to his offending." Although state hospital inmates could gain access to drugs and alcohol, there was no indication Cooley had done so while he was there. He had not participated in alcohol abuse programs at Coalinga.

In Dr. Abrams's opinion, Cooley needed treatment to help him understand the severity of his problem with alcohol and accept his need for treatment. He did not think

the state hospitals offered the sort of intensive program Cooley needed, but believed such a program would be available in a conditional release program. He expressed his willingness to work with the court in finding a suitable program.

Dr. Abrams believed the community would be adequately protected if Cooley were placed on conditional release in a residential alcohol treatment program and not allowed to leave until he was ready. He would not recommend unconditional release.

On cross-examination, Dr. Abrams acknowledged that his opinion that Cooley was not a sexually violent predator had not changed since he first evaluated him in 2009.

C. Hearing and Trial Court's Ruling

At the hearing, Cooley's counsel told the court, "I think at this particular stage all we're asking for is the opportunity for Mr. Cooley to put on a full defense for his petition for conditional release. . . . We would like the opportunity to have the hearing to present his best case for . . . a conditional release." Counsel made clear that he had not approached the hearing as a full hearing on the petition for conditional discharge, but rather as a "show cause" hearing that would allow the trial court to determine whether there was enough merit to justify a full hearing on the petition, which would include a more recent annual report and a full evaluation by Dr. Abrams. The deputy district attorney argued that Cooley had not met his burden to show there was "probable cause to believe [he had] changed in such a way [that he was] either no longer [an] SVP or no longer a substantial danger to the community."

The trial court denied the petition for conditional release, explaining that its reason for doing so was Cooley's uncooperative, defiant, and impulsive behavior, his refusal to participate in the SOTP, and his high score on the STATIC-99R. The trial court found that probable cause did not exist to believe Cooley's diagnosed mental disorder had changed so that he was no longer a danger to others and not likely to engage in sexually violent criminal behavior. The court therefore concluded there was no need for a further evidentiary hearing.

II. DISCUSSION

A. The SVPA

"The SVPA provides for the involuntary civil commitment, for treatment and confinement, of an individual who is found by a unanimous jury verdict [citation], and beyond a reasonable doubt [citation], to be a 'sexually violent predator' [citation]. The definition of 'sexually violent predator' is set forth in section 6600, subdivision (a)(1) as follows: ' "Sexually violent predator" means a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.' " (*People v. Olsen* (2014) 229 Cal.App.4th 981, 991 (*Olsen*).) A person found to be an SVP is subject to an indefinite term of civil commitment, but may petition for unconditional or conditional release under certain circumstances. (*Id*. at p. 992; see §§ 6605, 6608.)

When a person is committed to the State Department of State Hospitals (DSH) as an SVP, an annual report must be prepared every year; the evaluation must consider whether the person currently meets the definition of an SVP and whether conditional release pursuant to section 6608 or an unconditional discharge pursuant to 6605 is in the SVP's best interest and whether conditions can be imposed that would adequately protect the community. (§ 6604.9, subds. (a) & (b).) If the DSH concludes either that the person is no longer an SVP or that conditional discharge would be appropriate, "the director shall authorize the person to petition the court for conditional release to a less restrictive alternative or for an unconditional discharge." (§ 6604.9, subd. (d).) Even in the absence of the director's authorization, the committed person may petition for conditional release. (§ 6608, subd. (a); *McKee*, *supra*, 47 Cal.4th at p. 1186.)

1. Petitions for Conditional Release

Section 6608 governs petitions for conditional release. Under that statute, the trial court makes a threshold determination when it receives such a petition: "Upon receipt of a first or subsequent petition from a committed person without the concurrence of the director, the court shall endeavor whenever possible to review the petition and determine

if it is based upon frivolous grounds and, if so, shall deny the petition without a hearing."[6] (§ 6608, subd. (a); *Olsen*, *supra*, 229 Cal.App.4th 981, 993.) If the court finds the petition is not frivolous, a hearing is scheduled. (§ 6608, subd. (b); *Olsen*, *supra*, 229 Cal.App.4th at p. 994.)

At that hearing, the court determines "whether the person committed would be a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior due to his or her diagnosed mental disorder if under supervision and treatment in the community. . . . If the court at the hearing determines that the committed person would not be a danger to others due to his or her diagnosed mental disorder while under supervision and treatment in the community, the court shall order the committed person placed with an appropriate forensic conditional release program operated by the state for one year." (§ 6608, subd. (g) (former subd. (f)).) If the report required by section 6604.9 did not determine that conditional release was appropriate, the committed person has the burden of proof at the hearing by a preponderance of the evidence. (§ 6608, subd. (k) (former subd. (i)).) After a minimum of one year on conditional release, the committed person may petition for unconditional discharge pursuant to section 6605. (§ 6608, subd. (m) (former subd. (k)).)

Two other procedural provisions of section 6608 are pertinent here. First, the hearing may not take place "until the community program director designated by the State Department of State Hospitals submits a report to the court that makes a recommendation as to the appropriateness of placing the person in a state-operated forensic conditional release program." (§ 6608, subd. (f) (former subd. (d)).) Second, at the time of the hearing, former section 6608, subdivision (e) provided that the county's

[6] If the court has previously denied a petition for conditional release, the court must deny a subsequent petition "unless it contains facts upon which a court could find that the condition of the committed person had so changed that a hearing was warranted." (§ 6608, subd. (a).)

designated counsel "shall have the committed person evaluated by experts chosen by the state."[7]

2. Petitions for Unconditional Discharge

Section 6605 establishes a different procedure for unconditional discharge. (See *People v. Landau* (2011) 199 Cal.App.4th 31, 37 [comparing procedures under former sections 6605 and 6608].) A petition for unconditional discharge may be made either when the DSH has authorized it (§ 6604.9, subd. (d)) or after an SVP has spent at least a year on conditional release (§ 6608, subd. (m) (former subd. (k)). When the court receives a petition for unconditional discharge, it holds a show cause hearing. (§ 6605, subd. (a)(1).) If the court determines that "probable cause exists to believe that the committed person's diagnosed mental disorder has so changed that he or she is not a danger to the health and safety of others and is not likely to engage in sexually violent criminal behavior if discharged," the court sets a further hearing. (§ 6605, subd. (a)(2).) At the hearing, the committed person is entitled to be present and to have the benefit of all constitutional protections that were available at the initial commitment hearing, including the rights to a jury and to have experts evaluate him or her. The state has the burden of proof beyond a reasonable doubt that the person still meets the SVP criteria. (§ 6605, subd. (a)(3).)

B. Failure to Follow Procedures Mandated by Section 6608

Cooley contends the trial court erred in failing to comply with the procedures required by section 6608 when a committed person files a petition for conditional release. The Attorney General concedes at least one of the procedural errors, but contends any errors were not material.

As Cooley points out, two specific actions required by section 6608 did not occur: First, there was no report by a community program director evaluating the appropriateness of placing Cooley in a conditional release program. (§ 6608, subd. (f)

[7] This provision was renumbered and amended, effective January 1, 2015, to provide that the designated attorney "may" have the committed person evaluated by experts chosen by the state. (§ 6608 subd. (g); Stats. 2014, ch. 877, § 1, p. 5675.)

(former subd. (d)).) Second, the district attorney did not have Cooley evaluated by "experts chosen by the state." (Former § 6608, subd. (e).) Instead, he relied solely on the section 6604.9 annual evaluation that Dr. Malhotra prepared more than a year before the hearing.[8]

It appears to us that these omissions stemmed from a threshold misunderstanding on the part of both the parties and the court about what statute and procedures applied to the petition. As we have explained, a two-step process takes place in a petition for conditional release under section 6608: The court first "shall endeavor whenever possible to review the petition and determine if it is based upon frivolous grounds." (§ 6608, subd. (a).) If so, it denies the petition without a hearing (*ibid.*); if not, the matter is scheduled for a hearing. (§ 6608, subd. (b)(1) (former subd. (b)).) Although Cooley petitioned for conditional release, all concerned seemed to assume that the court should apply the procedures applicable to a show cause hearing under *section 6605* (which governs petitions for unconditional discharge) rather than those of a hearing on the merits under *section 6608*. The motion for conditional release stated on its face that it was made under section 6608, subdivision (a), and sought a "court trial" on the issue of Cooley's current dangerousness. And, there is no indication the trial court found the petition frivolous. However, the court minutes from a hearing after the motion was filed indicate that Cooley's attorney "request[ed] an Order To Show Cause Hearing in 30 days." In his opposition to the petition, the deputy district attorney cited section 6605, subdivision (c) (governing petitions for *unconditional* discharge) to argue that in order to set a hearing on the issue, the court must find probable cause to believe that Cooley's condition had changed so much he no longer met the criteria of an SVP. He went on to argue that it was common for courts to make that determination solely on the annual progress report

[8] As we have explained, a subsequent amendment to section 6608 now makes the evaluation by experts chosen by the state permissive rather than mandatory. (§ 6608, subd. (g).) However, under the statutory provisions in effect at the time of the hearing, we agree with Cooley that the expert evaluations contemplated by section 6608 were different from the annual evaluation required by section 6604.9.

from the state hospital. At the hearing itself, Cooley's counsel told the court he was treating the hearing as an "opportunity to show cause that there is enough merit in the petition to have a . . . hearing on whether he should be released conditionally." The district attorney, for his part, argued that Cooley had not shown "probable cause" that he was no longer an SVP—a standard used in section 6605, subdivision (a)(2), to determine whether a hearing should be set, but not in section 6608. And in ruling on the motion, the trial court used the same standard, stating that it was "unable to find that probable cause exists to believe that Mr. Cooley's diagnosed mental disorder has changed to such a degree that he is not a danger to the health and safety of others and is not likely to engage in sexually violent criminal behavior," and that there was no need for a further evidentiary hearing.

This confusion about which statute governed the proceedings appears to have led the court to sidestep the procedures mandated by section 6608, in particular the report of the community program director and the evaluation by experts chosen by the state.[9] (§ 6608, subds. (f) & (g) (former subds. (d) & (e)).) The Attorney General argues that these procedural errors do not require reversal because Cooley cannot show the error was material. For this proposition, she relies on *Reilly v. Superior Court* (2013) 57 Cal.4th 641 (*Reilly*). There, our Supreme Court addressed the question of whether a court must dismiss an SVPA civil commitment petition that was based on evaluations conducted under an invalid assessment protocol. (*Id*. at p. 646.) The court answered that question in the negative, concluding an alleged SVP "must show that any fault that did occur under the assessment protocol created a *material* error." (*Ibid*.) Since the alleged SVP was later found to be an SVP under a later, validly adopted, protocol, the high court concluded it was clear that the error in using the original assessment protocol did not materially affect the evaluations. (*Id*. at p. 656.)

[9] Cooley's counsel did not raise this issue in the trial court. However, the Attorney General does not contend that he forfeited it. We will consider it on the merits.

The Attorney General acknowledges that the court did not receive a report from the community program director as to the appropriateness of placing him in a state-operated conditional release program. However, she argues, the omission was not material because Dr. Malhotra's annual report indicated that Cooley had not participated in a sex offender treatment program at Coalinga and concluded he could not be treated effectively in the community. Moreover, she contends, even if additional expert evaluations were required (former § 6608, subd. (e)), their omission was immaterial because Cooley had failed to engage in treatment at Coalinga.

On this record, we cannot conclude that the failure to follow the procedures required by section 6608 was immaterial. We recognize that Cooley had not participated in treatment at Coalinga and had not provided a written community release plan, and that there was evidence that failure to do so was a risk factor for reoffending. However, there was also evidence that Cooley had not shown signs of deviant sexual behavior during his commitment; that his alcoholism, combined with his borderline mental functioning, were major factors in his offenses; that treatment appropriate for his combination of problems was not available to him in the state hospital setting; and that intensive treatment suitable to address Cooley's problems would be available in a conditional release program.[10] Thus, the state of the evidence does not show that the community program director would *necessarily* have concluded that Cooley could not appropriately be treated in a conditional release program. This is particularly true given the fact that the annual report was more than a year old, and indicated there had been a "trend of improvement."

[10] Dr. Abrams recommended a residential alcohol treatment program, without permission to leave the program until he was ready. The Attorney General suggests that this plan would not meet the requirements of a conditional release program under section 6608, which provides that "[a] substantial portion of the state-operated forensic conditional release program shall include outpatient supervision and treatment." (§ 6608, subd. (g) (former subd. (e)).) The question of the suitability of a conditional release program is one that can be explored in the report of the community program director and in the hearing on remand.

In the circumstances, Cooley is entitled to a new hearing, conducted pursuant to the requirements of section 6608, to determine whether his petition for conditional release should be granted. Because we reach this conclusion, we need not consider his remaining contentions on appeal.

III. DISPOSITION

The order denying Cooley's petition for conditional release is reversed. On remand, the trial court shall consider the petition according to the procedures specified in section 6608.

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Rivera, J.

We concur:

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Reardon, Acting P.J.

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Streeter, J.